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The never ending story of international arbitration. The role of the CJEU in investment matters

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Abstract: The history of international arbitration in recent years has focused on and found its basis in the jurisprudence of the Court of Justice of the European Union in the matter of investments. The latest cases reported with two common elements, namely the resolution of a dispute through arbitration and the preliminary ruling. The aim of this paper is to investigate these latest cases and to provide ultra-in-depth points for the future of arbitration within the context of the European Union. Is it a necessary and mandatory solution for foreign investments? Does this mean the termination of international arbitration law for member countries of the EU? The total incorporation of the rules of international law into the law of the EU through the jurisprudence of the CJEU are some of the questions that will seek to be analyzed in this work.

Keywords: international arbitration; CJEU; BITs; foreign investments; EU law; jurisprudence of the EU; ICSID; enforcement of foreign awards; international private law of the EU.

Introduction

The Court of Justice of the European Union (CJEU) after the Achmea ruling of 2018 (Soloch, 2018; Ahmed, 2019)[1] paved the way for "taking away" work from arbitration in the international investment sector and the European Union despite the clauses involved in contracts between the states parties and the investors[2]. From a political point of view, the desire for jurisdiction of the courts of the member countries as well as of the CJEU shows that the European Union follows a path towards rules based on international law.

Investments between members of the EU and foreign investors were a reality based on the so-called direct investments. The European Commission had the main role against the international arbitration mechanism in the matter, thus

1CJEU, C-284/16, Achmea of 6 March 2018, ECLI:EU:C:2018:158, published in the electronic reports of the cases.

2Already since 2020 we have noticed the attempt we have seen from 23 Member States of the EU to continue the extinction of investments between Member States from bilateral treaties. Obviously also included the sunset clauses of these treaties where the relative effectiveness concerned one's investments. The relevant agreement was based on the inspired idea of applying to all future arbitrations after the Achmea ruling of 2018 and not those of the procedural system of the ICSID.

preventing intra-European disputes in the matter of jurisdiction between arbitrators and Member States and replacing the arbitration mechanism with an international form of an institutionalized nature[3]. This strategy began in 2017 during the deal of trade deal with Japan (Galanis, 2023).

The effectiveness of treaties on intra-European investments has reiterated that the jurisprudence in the arbitration sector[4] was not able (Reinish, 2012; Zarra, 2014) to speak of an antinomy between the treaties and the individual rules of a conventional nature in the same matter according to Articles 59, 30, par. 30 of the Vienna Convention of the Law of Treaties (VCLT).

Within this framework is also taken into consideration Art. 42 of the Energy Charter Treaty[5]. After the Treaty of Lisbon the investment treaties have attempted to confirm the full validity of these types of agreements. The conclusion of agreements and the provision to resolve a future dispute through arbitration was not a rule included in the Treaty of Lisbon and/or to another act

3The need for a relative reform of the arbitration in economic relations as well as those between non-European states and of an international multilateral nature in the investment sector already through the Comprehensive Economic Trade Agreement (CETA) which was signed between Canada and the EU from 29 February 2016 relating to the establishment mechanisms for the resolution of disputes arising from investments and from a single treaty on the subject.

4Eureko B.V. v. The Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension. 26 October 2010: https://www.italaw.com/cases/documents/418; Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award of 27 December 2016, 84ss: https://www.italaw.com/cases/5739

5Which in practice provided for the application of the succession of laws in time and at the moment that the subsequent treaties had the same parts and the same object as the first treaty. Thus it is established that the subsequent treaties between parties are thus equal and do not have as a different object an ad hoc position between individual clauses and which occurred later as an effective title.

of the EU.

As far as concern the United Kingdom we also have a decision (Florou, 2021)[6] referred to the enforcement of awards resulting from arbitrations under the ICSID with binding force according to the Washington Convention of 1965 and certainly long before the treaty of Lisbon which has provided for some obligations of a contrary nature, Art. 351 TFUE (Blanke, Mangiamelli, 2021). This is an agreement that is acquired by analogy to ensure the prevalence of international treaties that are signed by Member States even before the EU has had a certain competence in the matter.

Arbitral jurisdiction enters the scope of disputes where the contract is part of commercial arbitral judgments connected with the law in the arbitral seat and which also governs enforcement according to the 1958 New York Convention on the Recognition and Enforcement of International Arbitral Awards. Thus the carrying out of this procedure and the related execution of the award requested within the EU cannot be based if it is contrary to public order (Anastasopoulos, 2023) because a broad and general interpretation has the character of state aid (Northmore-Ball, Harvey, Courtier, 2021).

6Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], Case ICSID ARB/05/20, Award, 11 December 2013; Ioan Micula, Viorel Micula and others v. Romania [II], Case ICSID ARB/14/29, Award, 5 March 2020. https://www.supremecourt.uk/cases/uksc-2018-0177.html

The entire thought process was based on Art. 351 TFEU which includes a treaty subordination clause respecting previous international conventions binding one or more states as well as third states. The ratio refers to the rights already acquired from the past and the direct effectiveness that finds application within the participating state. Respect for treaties and rules with third states does not mean to allow the state to adapt constraints that are imposed and/or are contrary to EU law.

In the event of a conflict between an obligation assumed by a Member State and a previous convention and the obligations incumbent upon it under EU law, the state can legitimately give precedence to the former. The reference to the time of accession to the convention must be identified and a reasoning based on bilateral relations must be distinguished which verified in each Member State the first agreement that came into force for it. Also the EU law aims, due to the specificity, to maintain a very specific high level of integration.

Returning to the Achmea ruling the CJEU stated (Kochenov, Lavranos, 2021) that:

"(…) investment is contrary to EU law and therefore it is precluded in any case, since, through the provision of arbitration in a treaty in matters of investments, the Member States which are party to it agree to remove such disputes from their own jurisdictions, and therefore from the system of judicial remedies that Art. 19, par. 1, letter. b) TEU requires them to establish in the sectors governed by community law (...) the arbitral tribunals find themselves applying EU law, this would also have the consequence of depriving the CJEU of its role as sole interpreter of EU law pursuant to

Articles 267 and 344 TFEU, since in arbitration it would not be possible to activate the preliminary ruling mechanism (...)".

Of course, the practice after Achmea has not closed the courage to continue to resolve disputes based on general law and international agreements according to the provisions of a bilateral treaty in the field of investments which remains in the norm, made in the field of BITs in the context of a normal investment litigation without any arbitrator referring to the work of the CJEU on the matter (Halonen, Eichhorn, 2022)[7].

Ignoring the rules of international law for political reasons means stepping outside of the history of both the EU and international law because states and not private individuals are involved in these disputes. Of course, comparing a decision of the CJEU is not possible within the EU but only according to the principle of autonomy and the primacy of law. So the relative respect towards national systems creates a spirit of awareness where the main reasoning is to reach the final objective which is that of justice and of resolving a dispute of this type. The fragmentation of international law within one institution of the CJEU cannot be ignored and lies in the way of various interpretations of all kinds at both European and international

7See the case Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain, SCC case 2016/135 of 16 June 2022 (https://jusmundi.com/en/document/decision/en-green-power-k-s-and-sce-solar-don-benito-aps-v-kingdom-of-spain-award-thursday-16th-june-2022), where the tribunal affirmed the law of the EU as a lex superior that prevailed over contractual obligations between Member States and included within the scope of the ECT. Therefore the tribunal stated that it had no jurisdiction over the dispute.

levels.

The Komstroy case

After Achmea we encounter the Komstroy case of 2 September 2021 relating to the compatibility of arbitration which was born through the ECT[8]. It was not a question of the right to reach arbitration that was created by a bilateral treaty but of an obligation that came from a multilateral treaty. This is a rather perplexing situation given the affirmation of the existence of an interest which had a general character and which had to respect the relative obligation to continue arbitration within the framework of the ECT by all the states that are part of a multilateral treaty.

Starting from a request for a preliminary ruling which did not exactly concern the mechanism relating to the arbitrator of the ECT with the law of the Union has to do with the investment according to the ECT where the CJEU had full jurisdiction in the matter. On the other hand, the matter was also complicated due to the fact that the request for a preliminary ruling started from Paris which was the seat of the arbitration in this regard. Komstroy was a Ukrainian company. On the other side we have Moldova which was the defendant state of the arbitration. A country that was not part of the EU.

8CJEU, C-741/19, Republic of Moldavia v. Komstroy LLC of 2 September 2021, ECLI:EU:C:2021:655, not yet published.

The CJEU had to take a position regarding the compatibility of the arbitration arising within the scope of the ECT with the law of the ECT seeking to decide ultra petita. Thus it became consolidated in practice (Thierry, 2021) that the CJEU had to decide on a referral requested by a national judge and rule on its validity or not as well as whether the question was based on different rules according to what the national judge indicated. On the other hand, given the binding nature of this decision, no remedy was requested where the practice was not permitted. Therefore, the CJEU took into consideration that since France was the seat of the arbitration it had to respect the arbitrator from where he started the relevant matter. The arbitration argument respected thus the interpretation of the CJEU which was based on articles 18 TEU, 267 and 344 TFEU (Blanke, Mangiamelli, 2021).

The CJEU based itself on and attempted to analyze that the procedure, despite the fact that it included non-Member States of the EU, does not mean that the role of the EU was thus diminished given the primacy and direct effectiveness of the provisions. The investment arbitration tribunal to the judicial system of the Union as well as the impossibility for arbitrators to make use of the relevant preliminary ruling mechanism based on Art. 344 TFEU as noted in the Achmea case. It was resulted in

an automatic violation of the administration of justice within the EU which was based on the preliminary ruling. Therefore, the ban proposed and decided already in the Achmea case was recalled anew.

In particular, the CJEU ruled out in relation to the question that:

"(...) investment arbitration deriving from the ECT can be equated with those forms of dispute resolution provided for by other international agreements to which the Union is a party and which are not incompatible with the European law (…) investment arbitrators (i) apply Union law and (ii) do so in a way that undermines its autonomy, coherence and primacy (…) it does not take into account the possibility that arbitrators may find themselves applying, as often happens, Union law as a "fact" and therefore as an element introduced into the process by the parties, which cannot be the subject of independent investigation by the arbitral tribunal, a consideration which, in addition to having already been adopted by some arbitral tribunals, is expressly provided for in the context of the Comprehensive Economic Trade Agreement (CETA) and which the Luxembourg judges also considered sufficient to safeguard the autonomy and primacy of the law community in opinion 1/17 concerning the compatibility with EU law of the dispute settlement mechanism provided for by CETA (…)"[9].

In this way the CJEU has prejudiced its own arbitration law on issues that concerned the law of the EU and did not take into consideration the relevant proceedings concerning a question that arose from an ad hoc arbitrator who arrived at the same Court through a request for a preliminary ruling and as a result of an annulment procedure requested by the state which had the seat.

The general limit was that of public order. In this case it was not binding for the EU due to the relative differences having to do with the procedure and commercial arbitrations with two parties

9CJEU, C-741/19, Republic of Moldavia v. Komstroy LLC of 2 September 2021, op. cit.

who were private as we have seen in the past in the EcoSwiss case where national courts relied on public policy to annul the enforcement of an award and to respect the rules of the EU in the context of a commercial arbitration.

Within this context the arbitrations cannot be carried out through a preliminary ruling, as another type of procedure which is exclusive to the law of the EU thus trying to overcome the prejudice for procedures of an arbitral nature which respects state justice and the referral mechanism offering thus results and effects of collaboration between internal courts and arbitral justice. It is normal that the CJEU had to follow its own path of interpretation according to the law of the EU and certainly not that of domestic law and/or of the rules of international arbitrators.

(Follows): The PL Holdings case

Following up with another case of 26 October 2021, namely the PL Holdings case[10] the CJEU went further from previous cases relating to the contractual arbitrator. In this case we had in the arbitration court (which was created according to the Stockholm Chamber of Commerce (SCC) regulation) to resolve a case according the former Art. 9 of the BIT between Belgium, Luxembourg and Poland (Zascheva, Lentner, 2021).

10CJEU, C-109/20, PL Holdings of 26 October 2021, ECLI:EU:C:2021:875, not yet published.

Poland did not accept the arbitral tribunal and at the same time the arbitral tribunal decided to sentence Poland to compensate PL Holdings for damages due to forced sale of shares of Polish banks. The award was subsequently challenged in the local courts based on Articles 267 and 344 TFEU and on the related violation of the exclusive jurisdiction of the CJEU. Thus, Art. 9 of the BIT has been cancelled.

Furthermore, PL Holdings requested another arbitration proposal, denying thus the jurisdiction based on the BIT. Poland agreed to this option. The court of appeal of Stockholm took into account the Achmea ruling which had the relevant effect on the arbitration based on a BIT thus seeking to set aside the award and conclude an arbitration based on the dispute in question. Poland appealed to the Swedish Supreme Court where the relevant preliminary ruling was subsequently held at the CJEU.

Here too we have the same path as the previous one, only that the difference is that all participants are members of the EU. Also the rank of the court is different but the question of validity for an arbitrator agreement that was invoked by the investor could be assessed by the referring judge and formed the basis for a general compatibility between investors and states, obligations that arose from a contract that is part of the EU.

The commercial arbitration affirmed the possibility that the annulment and/or enforcement of the award was sufficient to guarantee compatibility with the award and the fundamental principle of the EU[11] where the CJEU took into consideration that the arbitration was contrary to the provisions of the Treaty of Lisbon given that a Member State is party to an arbitration.

Also according to par. 47 of the same ruling it is noted that:

"(...) a Member State, which is party to a dispute may concern the application and interpretation of Union law, to submit that dispute to an arbitration body having the same characteristics of that provided for by an invalid arbitration clause contained in an international agreement [on investment], through the conclusion of an ad hoc arbitration agreement having the same content as that clause, would effectively lead to an avoidance of the obligations deriving from said Member State by the Treaties and, in particular, by Article 4, paragraph 3, TEU as well as by Articles 267 and 344 TFEU (...)".

According to the CJEU what was requested by the PL Holdings was accepted and could be proposed again in other arbitration proceedings that arose through BIT as is repeated in paragraph 49 of the same ruling. Therefore, the arbitration law of a Member State of the EU is equivalent to the law of the EU. It is the right to integrate international law into the law of the EU or simply the CJEU as a super partes, "perhaps" certainly superior for what an arbitral tribunal can decide to a case through members of the EU for a question of BIT between investor and

11 See in particular the conclusions of the General Advocate Kokott in the pars. 44-50 which brought us into question the validity of the ad hoc arbitrator clauses even if the relevant states are involved, also denying the possibility of adhering to one's own position where the states cannot allow and remove disputes concerning the right of the EU relating to the jurisdiction of Member States as a measure that puts the relationship between investors and individuals in the odd stage.

state. Also given that Member States can conclude agreements of an international nature for investments they can thus turn to the law of the EU, and to their own institution, i.e. the CJEU to resolve the case according to the rules of the EU and not through a court.

According to Art. 49 of the sentence the CJEU relied and agreed that PL Holdings accepted and reiterated that the relevant plaintiffs in the proceedings were born according to the BIT of an arbitral nature.

In our opinion the CJEU should have been based exclusively on the law of the EU and not to include rules of an arbitration nature according to a broad subjective interpretation thus trying to arrive and affirm conclusions that concern the application of a solution, where the dispute is part only between EU and Member States in investment matters. Perhaps continuing to regulate rules that come from international law could risk considering the ruling as contrary to the rules of the CJEU and paving the way in the past for a shopping forum of arbitrations between the Member States of the EU in order to reach the CJEU and/or perhaps not to arrive at a discussion according to the rules of the Treaty of Lisbon.

If this were the case, it is important to take into consideration the content of the BIT itself as we also read in par. 52 of the same decision which states:

"(...) Achmea (...), both from the principles of the primacy of Union law and of loyal cooperation, it appears that the Member States not only cannot undertake to remove from the jurisdictional system of Union disputes which may concern the application and interpretation of Union law, but also that, where such a dispute is brought before an arbitration body pursuant to a commitment contrary to that law, they are required to challenge, before that arbitration body or before the competent judge, the validity of the arbitration clause or of the ad hoc arbitration agreement pursuant to which that body was seised (...)".

Also the case of the CJEU: C-261/21, Hoffmann La Roche of 7 July 2022[12] is related to the obligation to refer to a preliminary ruling originating from the last rank of national justice. The same court in case: C-497/20, Randstad of 21 December 2021[13] noted and stated that:

"(…) aggrieved by the violation of their right to an effective remedy due to a decision of a court of last instance, may also enforce the liability of that Member State, provided that the conditions relating to the sufficiently serious nature of the infringement and the existence of a direct causal link between that infringement and the damage suffered by the injured party as it is mentioned, individuals who have possibly been harmed by the violation of their right to an effective remedy due to a decision of a court of last instance which is in conflict with European Union law, can assert liability of the Member State if the violation is sufficiently serious (...)"[14].

From a procedural point of view, the procedure is followed when the judge-rapporteur, after the opinion of the Advocate General, proposed a preliminary question[15] which in reality has the objective of pressuring the relevant judge to arrive at a

12CJEU, C-261/21, Hoffmann La Roche of 7 July 2022, ECLI:EU:C:2022:534, not yet published.

13CJEU, C-497/20, Randstad Italia of 21 December 2021, ECLI:EU:C:2021:1037, not yet published.

14CJEU, C-497/20, Randstad Italia of 21 December 2021, op. cit., par. 51.

15CJEU, C-144/22, Società Eredi Raimondo Bufarini of 15 December 2023, ECLI:EU:C:2022:1013, not yet published. C-482/22, Associazione Raggio Verde of 27 April 2023, ECLI:EU:C:2023:284, not yet published.

congruous sentence of content according to the interpretation of the EU. This is a position that is also noted the reaction obtained from the part of the European Court of Human Rights (ECtHR) in the Georgiou v. Greece case of 14 March 2023, where for the first time the reasoned decision coming from the last instance was affirmed by the judges and the preliminary ruling was not activated.

The ECtHR refers to Art. 267 TFEU when the judges of last instance are obliged to justify the reason for refusal for a preliminary question relating to the interpretation of EU law. The motivation in the sector of an arbitrator to be accepted and not to arrive to a preliminary reference to the CJEU, is based on a violation for a fair and reasonable trial both by the EU and the party who will not be able to obtain the relevant compensation. If this were the case, the right to exercise one's right and find a way to be compensated is comparable to that of the right of access to justice. The path of not referring a preliminary ruling without motivation from a judge of the last level even in the cases of arbitrations that we are analyzing will be a path of non-justice, leaving only an arbitrator who we do not know whether he has provided compensation or not. Thus this path on the side of the CJEU and the ECtHR allows to speak for effective, valid justice and at the same time to be a point of integration, cooperation within the scope of the EU law.

(Follows): The Micula and others v. Romania case

A third case concerning the history of international investment arbitration is the Micula and others v. Romania. In this case we have an investment as a consequence of the relative adoption of the Emergency Governmental Ordinance 24/1998 (EGO 24) by Romania which sought to guarantee tax incentives for those who have entrepreneurial activities in disadvantaged regions such as for example in the Stei-Nucet.

After the adoption of the relevant law 143/1999 which came into force on 1 January 2000 in Romania allowed country's transition and entry into the EU. The incentives committed to EGO 24 took the form of state aid from the Consiliul Concurentei (Competition Council).

With a following ordinance no. 75/2000 (EGO 75) the Romanian government tried to maintain the relevant incentives. After the request of the Competition Council, the Bucharest Court of Appeal and the highest level of the Romanian Supreme Court rejected the relevant request for annulment of the relevant ordinances. The thinking was that from 2007 after the country's entry into the EU the relevant incentives were practically revoked.

The participating investors decided to go to an ICSID arbitrator office which in 2013 has condemned Romania to compensation of approximately 178 million euros for violation of the rule on fair and just treatment, i.e. according to the acronym FET which was part of the BIT between Sweden and Romania in the period of February 2005- March 2009.

The European Commission (EC) on 31 January 2014 notified Romania for an act of execution of an arbitration award which constituted state aid and partially notified the award which had now taken the path of compensation.

The relevant decision of the EC-C(2014)3192 (Final) asked Romania to suspend the related payment of a final decision dealing with state aid accepting thus the enforcement of the award.

The EC undertook a further investigation procedure according to the ex Art. 108, par. 2 TFEU which concluded on 30 March 2015 in the spirit of state aid and on related payments which are carried out from Romania in implementation of the award[16]. This proceeding had related delays. The Bucharest government had to implement the arbitrator's decision also according to the enforcement measures which were concluded in third countries

16Commission Decision (EU) 2015/1470 of 30 March 2015 on state aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania. Arbitral award Micula v Romania of 11 December 2013 (notified under document C(2015) 2112) (Only the Romanian text is authentic) (Text with EEA relevance, OJ L 232, 4.9.2015, p. 43-70.

requesting the related obligation to recover the transfer of investments as proposed by the EC (Northmore-Ball, Harvey, Courtier, 2021).

The annulment of the decision before the Court of the EU resulted in a proceeding which was concluded on 18 June 2019 in favor of the investors as alleged state aid and even before Romania became part of the EU. The related payment of the award had to do with obligations of a nature accrued from the period which waw considered as illegitimate given that the term of the state aid was used when the TFEU was applicable to all Member States. The tribunal considered state aid to be illegitimate and part of a general legal category.

As was necessary this ruling could not be accepted therefore on 25 January 2022. A new application was received at the CJEU from the same EC relating to foreign investments within the EU which sought to annul the decision of the court of first instance based on the error of law. State aid is considered effective and conferred according to the applicable national law where for the CJEU:

"(...) (a) the aid has taken place through the use of state resources; (b) the use of state resources may have a detrimental effect on trade between Member States; (c) the resources employed favor the position of a trader; and (iv) competition is distorted (...). The aid deriving from the right to compensation for damage arose at the moment, prior to entry into the EU, in which Romania revoked the direct incentives to the actors, the subsequent award having a merely declaratory nature (...) the award is to be considered of a constitutive nature and therefore the effective and definitive right to the perception of the illegitimate sums by the investors arose in 2013 with the issuing of the arbitration decision (…). It did not fail to reiterate that,

moreover, the arbitration procedure (...) is not in itself to be considered compliant with community law on the basis of the arguments already advanced in Achmea, Komstroy and PL Holdings (...)".

The arbitrators actually legitimized the relevant assessment which was compliant with EU law. The investors have proven that the enforcement of the ICSID award in English courts and the related delays by the supreme court of the United Kingdom during the post-Brexit period (February 2020) has left the CJEU having to decide:

"(…) (a) the execution of the award. In the Micula case is mandatory by virtue of the provisions of art. 54 of the 1965 Washington Convention, according to which arbitral awards issued in proceedings celebrated under the auspices of the ICSID must be considered as res judicata in all Member States; (b) this conclusion is not affected by the participation of the United Kingdom in the EU, as art. 351 TFEU is without prejudice to the international obligations assumed by countries before joining the Union and, in the case of the United Kingdom, access to the ICSID preceded that to the EU (...) as already stated by the Court of Appeal of London in the same proceeding-that "all states which are parties to the ICSID Convention have an interest in the effective operation of the Convention scheme for the enforcement of arbitral awards" (para. 101), thereby confirming the idea that the Convention of Washington establishes erga omnes partes obligations, being aimed at creating a homogeneous space for the protection of investments and the circulation of arbitration awards (...)" (Momic, 2019; Liakopoulos, 2020a)[17].

After the related withdrawal agreement of 9 February 2022, the EC could sue any counter party before the CJEU for violations of the European treaties which occurred after the transition period. The EC followed therefore the path of going to the

17See also from the District of Columbia, decision of the 11st September 2019, 17-CV-02332, confirmed from the United States Court of Appeals for the District of Columbia, decision of19 May 2020, n. 19-7127, see also the Memorandum Opinion and Order of the United States District Court for the District of Columbia of 20 November 2020: https://jusmundi.com/en/document/decision/en-veteran-petroleum-limited-v-the-russian-federation-memorandum-opinion-of-the-united-states-district-court-for-the-district-of-colombia-friday-20th-november-2020

CJEU complaining that the United Kingdom in the relevant case:

"(...) (a) violated the obligation of loyal cooperation by deciding on a matter that was already pending before the European judges; (b) applied Art. 351 TFEU in circumstances - i.e. state aid deriving from the enforcement of the arbitration award, not falling within its scope of application; (c) violated Art. 267 TFEU, having not referred the question (...) through the preliminary ruling mechanism; and (iv) violated Art. 108, par. 3, TFEU, having implemented the arbitration award despite the procedure for violation of the ban on state aid undertaken by the Commission in 2014 (...)"[18].

Permission for some shared criticism

By carefully reading the three previous cases and the paragraphs of the relevant courts which are addressed, it is immediately clear that all the cases are addressed in every way to the CJEU as a super partes institutional body to find a solution to the dispute which concerned the matter of investments in the scope of the EU.

It is immediately clear that the examined discussions have made a certain distinction between international commercial arbitration which is compatible with EU law, the arbitral proceedings in this field also include that of the ICSID and the compulsory enforcement of awards (Liakopoulos, 2020c) respected international obligations that European institutions have ignored and which are at odds with national jurisdictions.

18 European Commission, Press Release of 9 February 2022, Sincere cooperation and primacy of EU law: Commission refers UK to EU Court of Justice over a UK Judgment allowing enforcement of an arbitral award granting illegal state aid: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_802

It is not the first time that the CJEU has dealt with international law by taking part of it and referred to the rules of the EU through the relevant jurisprudence. The main idea was the one connected with the primacy of the law of the Union in an autonomous way but at the same time respecting the rules of international law. A respect that in reality has not been read from any of the sentences just cited. The arguments used were precise but also complementary because the Luxembourg judges saw the rules of international law as rules included in the law of the Union.

A connection with the sentences was the argument of autonomy of the law of the Union where the rules of international law have not resolved the relevant dispute. The EU also took in consideration the role of interpretation through the preliminary reference of the law of the Union and of the founding treaties. The judges had the power through the preliminary ruling procedure to ensure the relative coherence and at the same time the application of the EU through a principle where autonomy respects first of all the right of each Member State and the right to conclude agreements between investors and other member countries of the EU, thus giving it an important role alongside the primacy of the law of the Union. The law of the EU already has an autonomous nature and is directly effective on its citizens

and Member States.

The characteristics of this network of principles between norms that interdependently relate the Member States of the Union were also based on the sentences from the CJEU. We recall the words of the Advocate General M. Szpunar on the subject who stated:

"(...) establish whether a (...) dispute involves, with certainty, the interpretation or application of Union law by the arbitral judge (…) the simple fact that there is a risk of this happening is sufficient to recognize a prejudice to the autonomy of Union law, provided that the dispute in which such a risk arises actually falls within the judicial system of the Union. I also note that this risk seems to me to exist for all intra-EU BITs. It therefore does not seem necessary to me to verify, in this case, whether the arbitral tribunal actually interpreted or applied Union law, or whether it could have done so (...) the Achmea ruling in the sense that the Court established as a criterion for compatibility with the principle of the autonomy of Union law of an arbitration proceeding based on an intra-EU BIT the question whether such proceedings deprive national courts of their jurisdiction in matters of interpretation and application of Union law, and the Court of its jurisdiction to respond in a preliminary ruling to the questions raised by them (...)"[19].

The problem is that risk and autonomous EU law cannot walk together. And the question is: On what basis the CJEU stated that the law of the EU was based on the rules of international law and in particular on the law of the Vienna Treaties of 1969 as well as on the non-derogable norms of general international law? Was this argument based on the autonomy of law which affirms a legal system which is disposed to the relevant institutions of the EU? Which derogates from the principles of jus cogens? Is it so? Will there be any attempt to derogate the

19CJEU, C-741/19, Republic of Moldavia v. Komstroy LLC of 3 March 2021, ECLI:EU:C:2021:164, not yet published.

rules of jus cogens in the near future? Perhaps we are at a utopia that is far from the logic of a literal application of what the CJEU decided.

In our opinion, the CJEU does not seek to annul absolutely anything, and/or what it has acquired through the history of binding international law for many years, both from a theoretical and doctrinal point of view but also in practice through jurisprudence.

What is most convincing is that the CJEU has tried to integrate the arbitration proceedings from BIT in a "light" and abstract way through a referral where the procedure is different from the legal system of arbitrators. To justify the behavioral work of the international arbitrators was not task of the CJEU but a systematic possibility which confirmed the jurisdiction of the CJEU in the matter and also to find a conclusive solution to a dispute concerning money according to the law of the Union (Verburg, 2021)[20].

It is also true that for countries that are not part of the EU this means a violation of the right of the Union to apply the law of the EU and to annul the execution of a related arbitral award. If this were the case, the foreign judge applying the law of the EU also means acceptance on the part of the CJEU. But if he doesn't

20 Greentech v. Italy, SCC Case V 2015/095, Final Award of 23 December 2018, par. 397: https://www.italaw.com/cases/7138; UP and CD Holding v. Hungary, ICSID Case No. ARB/13/35, Award of 9 October 2018, par. 252: https://jusmundi.com/en/document/decision/en-up-and-c-d-holding-internationale-v-hungary-decision-on-annulment-wednesday-11th-august-2021

accept the law of the EU, did it mean violation of the law of the Union?

A private international debate on EU law does not comply with all the rulings we have seen above. There is a certain discontinuity given that a path of dialogue between courts that followed the rules of international law was not followed. This attitude immediately remember the Achmea case given the relative incompatibility of the conventional rules where the CJEU did not even mention the Vienna Convention on the Law of Treaties. Perhaps because it did not have to give all this weight to international law and it tried to limit its competences according to the rules of EU law and not due to ignorance of these rules as has been said by the doctrine on the matter.

In the Komstroy case, however, the violation of obligations does not imply that the contracting parties can request compensation given that these obligations do not have a bilateral nature between the contracting parties[21]. Therefore, the CJEU states in this regard that:

"(...) the Energy Charter Treaty would contain derogable obligations in bilateral relations between the Member States of the Union (...) clashes with the objectivity, already noted in the doctrine on the basis of a careful reading of the practice of what is written in the ECT text, whose art. 16 expressly states that the provisions of the Treaty itself cannot be modified in peius. On this point, one could also argue in the sense that the ECT derives from the processing standards which can be configured as erga omnes partes obligations with respect to which each of the state party has an abstract interest in the execution by the other Member States (...) for obligations generated by treaties (and with respect to which the principle of relativity of

21 See from the General Advocate the par. 41 of the relevant conclusions.

effects remains) which are presented as objective and which legitimize a reaction by all the states party to the agreement in the event that they violated (art. 48, par. 1, lett.), the articles on the liability of states for illicit acts, of 2001) (…) lay down the text of art. 16 already mentioned, which would appear to constitute a widespread and objective interest in ensuring that the standards of treatment contained in the Treaty are not derogated in peius, including the possibility of resorting to inter-state arbitration (ex art. 27 ECT) where this occurs (...)"[22].

It is noted a broad discussion of rules (coming from international law) about international responsibility which was made without further analysis but based on the level of interpretation that was given by the judges to reinvigorate their discussion on the ECT in a plausible way giving thus greater scope for the law of the Union.

As regards the PL Holdings case, the CJEU did not rely on the execution of arbitration agreements and especially on Art. 2, par. 3 of the New York Convention but on the valid consent of an arbitrator where the BITs through an agreement between the parties have not found a basis only on rules and norms of international law but also on that system of private international law of the EU and especially in ex Art. 73, par. 2 of the Regulation n. 1215 of 2012 (Liakopoulos, 2018; Liakopoulos, 2019) for the recognition and enforcement of decisions in civil and commercial matters as a binding avenue for national judges to recognize the subject matter of arbitral jurisdiction and once again showing the supremacy and autonomy of the EU.

22CJEU, C-741/19, Republic of Moldavia v. Komstroy LLC of 2 September 2021, op. cit.

However, in order not to leave the Micula case out of the picture, the CJEU gave an important value to the arbitration award as well as to the damages of the investors, confirming that:

"(...) the date on which the right to receive state aid was conferred on its beneficiaries by means of a certain measure relating to the acquisition, by such beneficiaries, of a certain right to receive such aid and the corresponding commitment, on the part of the state, to grant said aid (...) such a measure may entail a distortion of competition such as to affect trade between Member States, pursuant to Article 107, par. 1, TFEU (...) the right to compensation granted by way of compensation for the damage that the appellants in the arbitration claim to have suffered due to the abrogation, allegedly in violation of the BIT, of the tax incentive regime in question was granted only with the award. In fact, it is only at the end of the arbitration proceedings initiated for this purpose by the latter, on the basis of the arbitration clause contained in Article 7 of the BIT, that the appellants in arbitration were able to obtain the actual payment of this compensation (...)"[23].

This is a statement where it took a completely different position from that of the court of first instance and the relevant paragraph no. 33 that affirmed the declaratory nature of the final decision which was based on the general theory of liability and the existence of a right to compensation for substantial damage also for an event. If this were the case, the International Law Commission stated that:

"(…) the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any state, even if the form which reparation should take in the circumstances may depend on the response of the injured state or states (…)" (Liakopoulos, 2020a)[24].

23Micula v. Romania [2020] UKSC 5, op. cit.

24ILC, Responsibility of States for Internationally Wrongful Acts, General

An international ruling among other things has as its objective not only to resolve a case but also to have a declarative character and a content based on the fair principle when the participating parties have requested that they have participated in an international tribunal to obtain a constitutive sentence and according to the vestments of justice of a material nature.

Thus, in the investment sector the CJEU felt strong by taking a hand based on the autonomy and primacy of EU law towards a position that is not only legal but also political against a history of arbitration in investment matters where the legal terms and decisions they influence both the rights of investors and simultaneously also protect domestic law, namely the own national judges of each Member State of the EU.

The investment before or after the Treaty of Lisbon seeks to adequately convince the protection of the economic activity of each state participating in this, perhaps a path that the CJEU also followed without bringing to the table this path of economic protection to this country and to its citizens. The practice that is noted through Art. 3, par. 5 TEU weighs heavily and influences the history of EU law for the respect and promotion of international law for the resolution of disputes. The CJEU still agreed with the principle of equality of arms as part of a fair trial which is referred to in Art. 47 of the Charter of the Fundamental

Commentary: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001pdf parr. 31, 91.

Rights of the European Union (CFREU) as well as the principles of Art. 6 of the European Convention of Human Rights (ECHR). This path of autonomy of the CJEU perhaps also shows a certain autonomous and differentiated isolationism from international law as a fragmentation of international law[25] but also as a complete system that has integrated international law towards a scaling down of dialogue between courts that show harmony and completeness of the principles that the law of the EU has had behind it since its genesis (Zarra, 2017).

The interaction and evolutionary integration of the EU through the path of international law (McLachlan, 2008) also shows that these are not two systems in continuous war, in comparison via arbitral tribunals and law of the EU[26], as a consequence of a voluntary, political, legal relationship relevant for the evolution of two rights (Craig, De Bùrca, 2021) which in reality seek to protect the economic system of states and of the people who live in these by applying legal rules where the sunset clause contained in the BITs certainly attribute to the rights of investors but also put at peace the old disputes for the effectiveness of a treaty through its termination (Trooper, 2020)[27].

25ILC, Reporter M. Koskenniemi, A/CN.4/L.682, Section 58, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, par. 245.

26See also the case: Renergy v. Spain, ICSID Case No. ARB/14/18 of 6 May 2022, para. 343ss.: https://www.italaw.com/cases/9415. In this case the rules of EU law as well as international law including that of the ECT respected the principle of primacy of EU law as an application and respect also of the CJEU itself.

27Tropper affirms that: "(…) state parties remain the 'masters of the treaty', i.e.

Ultimately, the European Commission has decided to propose to leave the Union from the Energy Charter Treaty, paving the way thus for new claims in the sector of arbitration in this specific sector[28].

Distinction between non-ICSID investment arbitration and international commercial arbitration

As we reported in the previous paragraphs, the sentences that we tried to investigate allowed us to clarify and distinguish between two types of arbitrations which are not the same.

they can modify it as they see fit, but must do so explicitly. This follows from Article 70 VCLT (...) the parties otherwise agree, the termination of a treaty (…) (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.' Hence, the parties to an investment treaty arguably have the power to remove the sunset clause-and thus the rights that investors would normally enjoy after the termination of the BIT-if they so agree. However, the peculiarity of investment treaties is that the beneficiaries (or even holders of the rights) are individuals, not states. A removal of the sunset clause would deprive their investment of international protection on which they may have relied when making the investment. Accordingly, last November an arbitral tribunal dealing with an intra-EU investment dispute held that while the state parties 'remain the masters of their treaty, their control is limited by the general principles of legal certainty and res inter alios acta, aliis nec nocet nec prodest' (a thing done between others does not harm or benefit others). This was said to be reflected in the sunset clause (a provision which) shows that, even where the Contracting Parties terminate the treaty on mutual consent, they acknowledge that long-term interests of investors who have invested in the host state in reliance on the treaty guarantees must be respected. This is the purpose served by the 20-year sunset provision (Magyar Farming v. Hungary, paras. 222-223) (…) a sunset clause from changes. Conversely, in another intra-EU investment dispute a tribunal seems to have accepted the possibility of removing the sunset clause of a BIT holding that: 'As is undisputed, neither Hungary nor France has made any attempt to renegotiate, modify, or shorten the relevant "survival" period (…) the Tribunal would still have jurisdiction to hear this case (...) (UP and C.D. Holding v. Hungary, par. 265). (...) much will depend on the wording of the sunset clause (…)".

28European Commission, Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty, COM(2023) 447 final, 2023/0273 (NLE), 7.7.2023: Proposal for a COUNCIL DECISION on the withdrawal of the Union from the Energy Charter Treaty COM/2023/447 final.

The CJEU spoke generally about investment arbitration involving a state in a conceptual way, similar to an international commercial arbitration as it is noted in the Eco Swiss case[29].

It was an international commercial arbitration compatible first of all with EU law which guaranteed the uniform interpretation of rules of EU law even outside the conditions of application. The relevant obiter dictum was also seen in a sentence that resulted from the American supreme court in the Mitsubishi case[30] where in reality the court tried to affirm the arbitration procedure that characterized each Member State of the EU, each subject to the control of the relevant judges of the Union, thus referring the discussion to the CJEU through a preliminary ruling.

The general rule that every arbitration should be celebrated in a seat in the country that is part of the EU, is the preliminary ruling. It is a mechanism where all arbitrators are not celebrated by the ICSID framework since it did not provide for the venue of the ongoing procedure[31]. The involvement of a state among

29 CJEU, C-126/97, Eco Swiss of 1st June 1999, ECLI:EU:C:1999:269, I-03055.

30 US Supreme Court, sentence of 2 July 1985, Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985), 638: https://supreme.justia.com/cases/federal/us/473/614/

31 According to the case, in par. 510: "(…) as it should and as the advocate general essentially suggested [in Achmea]) that arbitration disputes (all) have nothing to do with 'disputes relating to the interpretation or application of treaties' which the Member States pursuant to art. 344 TFEU undertake not to submit to a method of settlement other than those provided for by the treaty', and then the arbitration is also saved from the BIT; or that expression is understood in a broad sense as including any dispute in which Union law may be directly or indirectly applied, and then the commitment (...)".

the parties to the dispute can also take into account the perspectives established by the EcoSwiss[32] as a general consideration where the arbitrators were born from a treaty which was born consequently from a related contract[33].

Within this context, the preliminary ruling mechanism exercises the control that is part of the public policy of an arbitration award considering and ensuring compliance with the principles

32According to the conclusions of the General Advocate Kokott in case PL Holdings, op. cit., par. 52: "(…) intended to expressly refer the topic of the autonomy of the parties or the free expression of their will to commercial arbitration only. This is understandable for disputes arising between parties in an equal position. In disputes of this kind, not only the arbitration clause, but the contested legal relationship itself is based on the autonomous will of the parties (...); par. 54: the main case does not constitute a commercial dispute between parties in an equal position, but rather concerns the exercise of public powers by the Polish administration. Where a private party is subject to a provision of the public administration - in this case, to banking supervision - there certainly cannot be talk of free will, at least with regard to the party itself. For this reason alone it seems unlikely that, at a later stage, a Member State would conclude an arbitration agreement with the private party based on a free choice and concerning the provision itself (...) such arguments could invalidate the validity of the consent to arbitrate in relations between states and foreign investors, however, remains to be discovered (...), par. 55-58: (...) the substantial involvement of a public administration in arbitration disputes can determine a difference in terms of loyal cooperation between Member States compared to procedures between private parties alone: it is in fact the task of the judges of the Member States to refer the question to the Court of justice pursuant to art. 344 TFEU both in cases of arbitration between private individuals and arbitration involving a Member State (...)"

33In case Micula the court affirmed in par. 144 that: "(...) the problem relating to the compatibility of investment arbitration with EU law would lie in the fact that the consent expressed through BITs, unlike that which would have been granted in the context of a commercial arbitration procedure, is not originates in a specific agreement that reflects the autonomy of the will of the parties involved, but results from a treaty concluded between two states, within the framework of which the latter have, generally and in advance, agreed to remove the jurisdiction of their own judges disputes that may concern the interpretation or application of Union law, to the advantage of the arbitration procedure (...) a statement which in itself cannot be shared (given the genuineness of the consent to arbitrate expressed by the states through the BITs) and furthermore denied by the Court itself in PL Holdings where it stated that even investment arbitration arising from contracts is not compatible with EU law (...)".

of the EU of being involved with the private parties of an arbitration of which it is part to a state. Thus the arbitration that comes from a contract that is not part of the BIT even before the national laws allow private parties to stipulate a contract to submit disputes to the jurisdiction of arbitration tout court.

The obligation to refer for a preliminary ruling which establishes an arbitration authorizes the parties through a BIT and the state actually expresses its will.

This is what we saw in the PL Holdings and Komstroy case where the CJEU through the referral for a preliminary ruling requested the annulment of the award in the state of headquarters. If the arbitration respected the jurisdiction of the Union, it could not have existed. Within this framework, art. 53 is noted. Particularly, in the Achmea case it is stated:

"(…) judicial review (of the domestic judge) can be exercised by the aforementioned judge only to the extent that national law allows it (…) Article 1059, paragraph 2, of the Code of Procedure civil law (German) provides only limited control, which concerns, in particular, the validity, in light of applicable law, of the arbitration agreement or compliance with public order for the recognition or enforcement of an arbitration award (...)"[34].

34See also the conclusions of the Advocate General Kokott in case PL Holdings that affirmed: "(...) violation of Union law can also be prevented, if the review of the judges of the Member States on arbitral awards is not limited to the sole observance of the fundamental provisions of Union law, but also to respect for the law of the Union as a whole with the possibility of referring the matter to the Court in case of necessity (…) why awards arising from commercial arbitration must comply only with the fundamental principles of Union law (as part of the control of compliance with the public order) while for awards issued in investment procedures the compliance check should be extended to Union law as a whole (...)".

The notion of the public order falls within the respect of the fundamental norms of the EU as well as the interpretation of the public order which reaches the solution of an appeal to the matter of investments within the EU.

It is precluded that the power of arbitrators to apply the law of the EU it also applies any form of national law taking the basis of the preliminary ruling mechanism as an argument which states that the application of a different law, perhaps even that of the international law seems to be illegitimate given that the arbitrators have recourse to judicial bodies to decide on a broader interpretation in the case of domestic law problems.

The execution of ICSID awards

Going even deeper from the Micula case we can see that the CJEU has not given any importance to the circulation of awards according to the ICSID convention. Equalizing the awards in the ICSID system in all the state parties which are approximately 155 means ensuring the execution of ICSID awards according to domestic jurisdictions as provided for by art. v of the New York Convention as grounds for review of an arbitral award and as provided by the ICSID Convention and the former Art. 52 for the relative annulment.

Moreover Art. 54 of the ICSID convention is considering erga omnes partes. As it is noted in the case where the supreme court of the United Kingdom affirmed:

"(...) the execution of the Micula award and they affirmed, speaking of a network of mutual enforcement obligations (...) the correct execution of the awards ICSID in all State Parties corresponds to an objective interest of all signatories, who, if the fulfillment of this obligation does not take place, could appeal to the International Court of Justice (ICJ) pursuant to art. 64 of the same treaty 58 (…)" (Florou, 2021).

The CJEU has taken Art. 54 ICSID into consideration before the law of the EU and in case the doctrine concerning that:

"(...) carefully constructed ecosystem is disrupted where an unrelated supranational body attempts to interfere with the obligations of a State Party to the ICSID Convention (…) rise to is that the courts of a state being asked to enforce an ICSID Award will feel torn between the clear provisions of the ICSID Convention on the one hand, and the clear instructions of the supranational body-which go directly against the ICSID Convention-on the other (…)" (Florou, 2021; Northmore-Ball, Harvey, Courtier, 2021).

The ICSID convention actually presents itself as "obedient" to the law of the EU even before entering the Union and only for the obligations that the Member States have had towards third states the right to conclude agreements with the Union at the disposal of obligations that are assumed within the exercise of state competences and to the bodies of the Union (Eilmansberger, 2009; Dimopoulos, 2011).

Thus the safeguard clause for competences of a single nature are attributed to the Union as obligations in the matter of safeguarding and according to the rules of the Union and with the competences offered by the Member States of the organization (Pantaleo, 2014).

Concluding remarks

It is a "customary" rule the fact that the CJEU has obtained through the sentences that we have investigated principles, values, primacy and autonomy of the law of the EU, i.e. a consequence of a legal system where it also provides for and includes even in a tacit way the principles of international law.

These are forms of autonomous legitimation, as instruments of a primarily political and then technical will of the judges, which affirms arbitral, domestic and European jurisprudence to the veritas facit legem. Investments and BITs will certainly continue to have their role between states (Wehland, 2022) and the validity of the intra-European BITs as we have also seen in the Eureko case (Galanis, 2023)[35] allowing the relative extinction between concluded BITs.

Successful or unsuccessful investors will make efforts to enforce arbitral awards also in third countries where the commercial future even for Member States of the EU are topics that fall outside the law of the EU, the arbitration clauses and related procedures. The approach of the CJEU in this sector perhaps in the coming years should find a different way from that of the past to carry out its activity because if this were not the case the risks that are referred to through the causes analyzed above will

35Eureko B.V. v. The Slovak Republic, op. cit., par. 156.

now be an endless reality and certainly without a final solution to resolve the dispute.

Furthermore, the judge of the CJEU with the way of the preliminary ruling seeks to control the situation of an arbitration coming from international law and the included rules. Art. 31-33 of interpretation of VCLT show the application of the general rule of interpretation which clearly highlights the international agreements, which are also part of the investment sector as a way of harmony with elements recalled by the provisions of the same concluded treaty and of the terms used, i.e. the textual and objective criterion as well as the individual provisions obtained, that is the systematic criterion. The realization or not of this interpretative path now has a secondary character as does the reversal of a theological criterion for the deepening of the process of European integration.

The European judge is not against international arbitrations but in a compliant manner thus also interpreting constitutive acts which are included through the investment treaties regardless of whether they are also third party states and not members of the EU, relying on a system of integration of the treaties of the EU through a general reference to the general rule of various interests crystallized in good faith for the contracting parties.

This is a super partes form of protection, as a result of the protection of a shield for the autonomy of the legal system of the EU, which also guarantees a high level of supranational cooperation giving the possibility of reconstructing the content of the rules community through rules of international law.

It is also true that this "work" of the judge of the CJEU includes elements of excessive fragmentation and discontinuity given that he also exercises and should respect the principles of international law. The permitted elements and the way of reconstructing in an overall way the relationships of an existing system between EU law and international law are evaluated through a fairly rigorous coordination action of elements of practice that are available as statements that are even prima facie ambiguous, contradictory and/or isolated but contribute a sense of completeness for the Luxembourg judges.

The process of supranational integration continues as a phenomenon that presents itself in constant evolution despite undergoing quite significant alterations through the relevant jurisprudence. Jurisprudential practice of international standing is one of the examples that plastically depicts the evolutionary capacity of the thinking of the courts of the EU.

It is an evolution that perhaps "risks" for the near future not only doctrinal criticism but also from the international law to decreasing the exact meaning of the rulings while also avoiding

imprecise conclusions. But this risk is a reality that can be seen in any international tribunal.

The jurisprudence of the EU concerning international standing seems to exclude a priori solutions to issues and mechanisms applied in the individual legal systems of the Member States so it is sufficient in an elastic way to be able to represent mutatis mutandis the relationships of a system that exists between international law and the EU. Ascertaining rules of international law does not mean snubbing the existence and/or content of international law but constitutes the prerequisite for its application in the internal legal system as a parameter that emerges from a modern trend of a now global law, between the dialogue with the courts defining the status and content of even the rules of international law themselves.

This trend confirms that international law is now perceived as a global law used by supranational courts in a distinct and elegant way as a parameter of adaptation in domestic law as a requirement that fits with the principles of general international law. The general principle of the EU is respect for the subjects of the legal system, i.e. of international law as a sort of continuous transformation of a permanent nature which takes shape in a parallel link through the exercise of competences and the contradiction of a reverse phenomenon of the principle of parallelism of skills.

By forming a similar principle and developing the elements provided by EU law, it is provided an interpretation of this principle that places limits on a perspective inspired by a genuine logic of a dualistic nature towards the protection of a distinctive character as is also provided for by domestic law.

The CJEU does not forget, does not abandon the thought of international arbitrations even if it finds itself with problems of conflict between different rights, it tries to confirm that the system of the EU presents a role of primacy with relations with international law in an exclusive way and without diminishing the forms of integration within the Member States always through an elastic and parallel way.

From a de iure condendo perspective, the solutions found by the judges of the CJEU take shape in the context of the integration process of the EU, recalling the need for the development of law as a unitary and coherent action in the management of external relations and the policies of the EU.

This relationship of cooperation and collaboration also finds a broad basis for confirmation through interpretation. An interpretation that finds space in the principle of contextual interpretation codified by Art. 31 CVLT and the systemic integration of the same agreement. The material transposition of (binding) international instruments is interpreted through every rule of international law and as a relevant result in relations

between Member States.

The Luxembourg judge excludes the possibility of providing for legal concepts that are also apparently similar to other international systems through procedures that do not formalize the interpretative action. The trend of affirmation and penetration of international law into the law of the EU is a fact that is called as a parameter of international instruments directed at the EU and implemented by it.

The manifestation of permeability of the legal system of the EU is elaborated through the CJEU, as a substitution theory which thus makes it possible under certain conditions to bind the institutions with international commitments and together with the Member States to also influence the exercise of the competences of their own body.

The international ownership of regulatory requirements, as objects of substitution are necessary elements for evaluating the conduct of foreign states and members of the EU who give consent and/or acquiescence to the substitution. We do not make the mistake that the replacement goes outside the borders of the EU and tries to play a role in the international arena. The techniques of direct incorporation of international rules as a task of opening national law that respects international instruments as well as of the EU, respect international agreements and replace them with subsequent agreements in the same way as the

law of the EU has done on the regulatory level.

This unitary model of reconstruction of this type of relationship measures is also applicable to structural limits in the sector of cooperation within EU law.

Within this profile, a system of validity, control, evolution and judgment is maintained which in many ways describes the legal perspectives that distinguish the law of the EU and on the other hand makes a global law more effective including both domestic, European and international law.

This guarantees the maintenance of a reality that needs the loyalty of inter partes courts as a guarantee of mechanisms for judicial control of international obligations that Member States or not are holders of.

Within this framework, the discussion of the international responsibility of Member States which do not respect rules and which are directly traced back at the level of the life of international relations in the legal sphere to a general international law, is the object in this phase of the de facto replacement of the Union. The fulfillment of international obligations, the transfer of competences and ownership of international commitments either because the competences are shared between Member States of the Union is not only of international relevance but also of forms of self-restraint on the part of the states injured and of the bodies that assume their

concurrent, precise, full responsibility for the Member States.

The judge of the CJEU is always concerned about the possibility for assessments to be made at a forum for the assessment and application of international law. The political will in order to protect the domestic cooperation system that the onset of international offenses is attributable to the Union and/or through the right to compensation for damages through international arbitration even if provided for in a clause of a treaty makes it necessary to have the scope of international standards to safeguard the effectiveness of the EU directly and linked to the Member States.

The need for an application and interpretation of international law is now a reality that respects international law in domestic law and also according to the principle of loyal cooperation codified by the EU and in relation to the obligations of international law and according to the principle of strict cooperation in the perspective of de lege ferenda, as a necessity that is based on the principles of the treaty of Lisbon, on the rigorous observation of international law as a conductor of the relations of the EU and as a need for coherence between external and internal action.

The impact of general international law in the law of the Union has to do with an impact that takes a position and which constitutes a progressive development of international law. This is a jurisprudence that shows a new status of customary law, which concerns significant sectors in international law i.e. the law of treaties, protection of fundamental rights, international investment law, as a lively intellectuality of dynamic interest, which is distinguished from classical international law but which deserves to be regarded so favorably. Cooperation as an object of evaluation influences and reflects on the plurality of international law systems. This is not a new trend but a value based on dynamics that contribute to phenomena of different legal systems of international origin.

The Luxembourg judge is aware of the respective jurisdictions and plays the role of guarantor trying to facilitate the circulation of legal concepts that promote a cross-fertilization of greater coherence to a global international order of greater intensity from the past. Towards a manifest cooperation where the rules of international law are comprehensively and rigorously reconstruct a new system of intersystem relations towards a process of European integration that is distinguished from the one pre-founded on a logic of small steps.

The time is ripe, the fruits from the past are achieved as important results, imperceptible towards an evolution of the law of the Union relating to international law, as a testimony that considers time as a body that respects the continuous multiplication of an international reality without end to a global world, to a plural and global right.

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